UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 4:03 CR 434 CEJ DDN
	)	
DAVID G. BARFORD,	)	
KENT D. KALKWARF,	)	
DAVID L. McCALL, and	)	
JAMES H. SMITH, III,	)	
	)	
Defendants.	)	

ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

This action is before the court upon the pretrial motions of the parties which were referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b). Hearings were held on October 3, 10, and 30, 2003, and on December 19, 2003.

TABLE OF CONTENTS

I. DISCOVERY MOTIONS

A. Government motion for production of witness's statement

The United States has moved for production of a witness's statement under Federal Rule of Criminal Procedure 26.2. Specifically, it seeks the production of defense attorney Neil Peck's original handwritten notes of an August 7, 2002 proffer meeting that included Peck, his client defendant James H. Smith, III, Assistant United States Attorney (AUSA) James Martin, Federal Bureau of Investigation (FBI) Special Agent Zachary Coates, and Postal Inspector Douglas Boland. (Doc. 91.)

Smith responds that he had offered to provide the government a copy of Peck's notes if the government would (1) adhere to certain use restrictions on use of the notes, and (2) provide a set of its exhibits to Smith. (Doc. 93.)

Because this motion relates to the hearing on defendant Smith's motion to dismiss, in which hearing the original of these notes was submitted for in camera review by the court, the court will deny the motion as moot.

B. Motion of defendants Barford and Kalkwarf to compel

Before the instant motion to compel (Doc. 109) was filed, the government and defendants submitted requests for information to each other, and responded to the requests, pursuant to Federal Rule of Criminal Procedure 16. In general, defendants' requests sought any and all documents in the government's possession which were prepared by or for Charter Communications (Charter) counsel, including those regarding statements by any defendants, including David L. McCall, by any unindicted co-conspirator, or by any other person the government intends to call as a witness at trial. Defendants also requested production of any document in the possession of the government which was prepared for or by Charter counsel which might support any defendant or demean the government's case.

Defendants David G. Barford and Kent D. Kalkwarf now have moved to compel the government to produce three categories of

information: (1) materials produced to the government by the Thompson Coburn law firm which represents Charter, (2) materials that qualify for disclosure under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), and (3) copies of any grand jury subpoenas issued to Charter or other corporate entities that included document requests.

In response, the government advises that all the materials provided to it by Thompson Coburn have been made available to the defense under Federal Rule of Criminal Procedure 16(a)(1)(E), with the exception of correspondence between the law firm and the government, and the firm's privilege log. The government denies refusing to produce materials critical to Barford and Kalkwarf.

The record is clear that the government has provided defendants with approximately 200 boxes of documents. Some 125,000 documents provided to the defense by Charter and other sources have been provided in scanned, electronically searchable form. Defendants do not dispute that, under Rule 16(a)(1)(E), the government has allowed them to inspect, copy, or photograph materials in the government's possession which are material to the defense, which the government will use in its case-in-chief at trial, or which were obtained from or belonged to defendants.

The government has not provided the defense with the reports of interviews of persons, including defendants, by Charter counsel. The court agrees that statements made by persons, including defendants, to non-government third parties (Charter counsel) are not discoverable under Rule 16, unless their production is constitutionally required by Giglio or Brady, or by the Jencks Act, 18 U.S.C. § 3500. See Fed. R. Crim. P. 16(a)(1)(A), (a)(1)(B)(ii); United States v. Vitale, 728 F.2d 1090, 1094 (8th Cir.), cert. denied, 469 U.S. 825 (1984). The government admits its obligation to comply with Giglio and Brady, and with the Jencks Act, and agrees to do so in time for its effective use at trial.[1]

[1]The court will order that favorable material under Brady be (continued...)

The government also admits it has not provided the defendants with the personal financial portfolios of potential witnesses and it has withheld an anonymous complaint received from a Charter employee who expressed fear of reprisal within the complaint. According to the government, none of these documents contain otherwise discoverable material. The government has offered these materials for in camera inspection by the court. The undersigned will order the government to produce such materials for such examination by the court.

Defendants seek, and the government has refused to produce to defendants, the grand jury subpoenas issued to Charter or any other corporate entity. Such grand jury materials are not to be disclosed, absent a particularized need shown by the defense. United States v. Proctor & Gamble Co., 356 U.S. 677, 681-82 (1958); United States v. Wilkinson, 124 F.3d 971, 977 (8th Cir. 1997), cert. denied, 522 U.S. 1133 (1998).

Defendants have not shown a particularized need for the grand jury materials to overcome the need to keep the materials confidential. Defendants argue that the many documents provided by the government appear to be organized according to specific subparts in the subpoenas' document requests and that having these documents would enable the defense to organize the examination and study of the documents. From the record it appears that the documents produced by Charter were accompanied by an index of these documents provided by Charter. The government has indicated that it did not use the Charter index in its investigation.

Further, defendants argue that it takes an inordinate amount of time to search the voluminous electronic documents

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[1](...continued)
disclosed to the defense not later than ten days before the commencement of trial. The court lacks authority to compel the government to produce Jencks Act materials other than is provided in the Act. United States v. Green, 151 F.3d 1111, 1115 (8th Cir. 1998); United States v. White, 750 F.2d 726, 729 (8th Cir. 1984). The government has stated it will provide such materials to the defense not later than the Friday before trial.

electronically. From the government's response, both in its written memorandum and during the hearing on this matter, it appeared that the government would cooperate with the defense in identifying commercially available computer software which would allow for efficient use of the electronic documents by the defense.

For these reasons, defendants' motion to compel discovery is denied, except for the in camera review and the production of favorable evidence.

II. SUFFICIENCY OF THE INDICTMENT

Defendants Barford (Docs. 85 and 145) and Kalkwarf (Doc. 90) have moved to dismiss the indictment, defendants Kalkwarf (Doc. 58) and Smith (Doc. 67) have moved for a bill of particulars, and defendant Smith has moved to strike surplusage from the indictment (Doc. 141). These motions challenge the facial sufficiency of the indictment.

The indictment alleges fourteen counts of offenses. Counts I through VI allege defendants Barford and Kalkwarf committed wire fraud (Counts I and II) and mail fraud (Counts III, IV, V, and VI) relating to an alleged scheme to appear to increase and to falsely report increased Charter revenues during 2000, involving business transactions with two suppliers of television set-top boxes

(revenue enhancement scheme), in violation of 18 U.S.C. §§ 2, 1341,[2] 1343,[3] and 1346.[4]

Counts VII through XIII charge defendants Barford, Kalkwarf, and Smith with wire fraud relating to a scheme to falsely report the numbers of Charter subscribers and disconnecting subscribers during 2001 (subscriber inflation scheme), in violation of §§ 2, 1343, and 1346.

As set forth more specifically below, each of the two alleged schemes alleges that the respective defendants devised and intended to devise a scheme to defraud investors in Charter securities and the investing public of money and property and to deprive Charter and its stockholders of the defendants' and other employees' honest services. (Doc. 1 (Ind.) ¶¶ 17, 44.)

Count XIV alleges against all four defendants that they conspired with one another and with others to commit wire fraud regarding Charter's subscriber numbers and subscriber growth numbers, in violation of 18 U.S.C. § 371. This count alleges sixteen overt acts in furtherance of the conspiracy.

To be legally sufficient on its face, the indictment in a plain, concise, and definite written statement must contain all the essential elements of each offense charged; it must fairly inform

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[2]In relevant part, § 1341 provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . [uses the mail or interstate commercial carrier] shall be [punished as set forth in the statute]. 18 U.S.C. § 1341.

[3]In relevant part, § 1343 uses the same language as § 1341, except the language following the ellipses in footnote 1 involves using wire and other electronic communication for the purpose of executing the scheme or artifice. 18 U.S.C. § 1343.

[4]Section 1346 provides, "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.

each defendant of the charge against which he must defend; and it must allege sufficient information to allow a defendant to plead a conviction or an acquittal as a bar to a future prosecution. See U.S. Const. amends. V and VI; Fed. R. Crim. P. 7(c)(1); Hamling v. United States, 418 U.S. 87, 117 (l974); United States v. Carter, 270 F.3d 731, 736 (8th Cir. 2001); United States v. White, 241 F.3d 1015, 1021 (8th Cir. 2001). "[A]n indictment should not be read in a hyper technical fashion and should be 'deemed sufficient unless no reasonable construction can be said to charge the offense.'" United States v. O'Hagan, 139 F.3d 641, 651 (8th Cir. 1998) (quoted case omitted)).

The essential elements of mail fraud and wire fraud are similar. They are (1) a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representations, or promises, (2) the use of interstate wires (or the mail) incident to the scheme or artifice, and (3) an intent to cause harm. See 18 U.S.C. §§ 1341, 1343; United States v. Frank, 354 F.3d 910, 918 (8th Cir. 2004); United States v. Frost, 321 F.3d 738, 740-41 (8th Cir. 2003); United States v. Ross, 210 F.3d 916, 928 n.3 (8th Cir.), cert. denied, 531 U.S. 969 (2000); United States v. Slaughter, 128 F.3d 623, 628 (8th Cir. 1997).

Again, when used to describe wire fraud and mail fraud, the phrase "'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.

The essential elements of the alleged conspiracy are that the respective defendant (1) agreed with another, (2) to achieve an unlawful objective, and (3) at least one overt act was committed in furtherance of the agreement. See 18 U.S.C. § 371; United States v. Falcone, 311 U.S. 205, 210 (1940); Slaughter, 128 F.3d at 628; United States v. Fetlow, 21 F.3d 243, 247 (8th Cir. 1994). The indictment identifies the laws that defendants are alleged to have violated, the nature and object of the conspiracy, the means and methods of the conspiracy, and sixteen overt acts in furtherance of the conspiracy.

A. Barford's first motion to dismiss

In support of his first motion to dismiss (Doc. 85), Barford adverts to two paragraphs of the indictment. Regarding the alleged revenue enhancement scheme the indictment alleges:

> 17. Beginning in or about August 2000 and continuing through on or about February 11, 2001, Kalkwarf and Barford knowingly devised and intended to devise a scheme to defraud investors in Charter securities and the investing public of money and property by means of materially false and fraudulent pretenses, representations and promises, by falsely inflating Charter's publicly reported year end revenue and operating cash flow and by making false statements relating to the inflated revenue and operating cash flow, in order to inflate artificially Charter's stock price, and to deprive Charter and its stockholders of their material and intangible rights to the defendants' and other employees' honest services. The honest services of which the defendants schemed to deprive Charter and its stockholders included:
>
> (a) the duty to conduct the business of the corporation in an honest fashion;
>
> (b) the duty to report corporate financial and operational results accurately and fairly; and
>
> (c) the duty to utilize the financial and human resources of the corporation for the best interests of the stockholders.

(Doc. 1 at 5.)

As to the alleged subscriber inflation scheme it alleges:

> 44. Beginning in or about May 2001 and continuing through in or about March 2002, Barford, Kalkwarf, McCall and Smith knowingly devised and intended to devise a scheme to defraud investors in Charter securities and the investing public of money and property by means of materially false and fraudulent pretenses, representations and promises, by falsely inflating Charter's subscriber numbers and subscriber growth numbers and by making false statements relating to Charter's subscriber numbers and subscriber growth numbers, in order to inflate artificially Charter's stock price, and to deprive Charter and its stockholders of their material and intangible rights to the defendants'

> and other employees' honest services. The honest services of which the defendants schemed to deprive Charter and its stockholders included:
>
> (a) the duty to conduct the business of the corporation in an honest fashion;
>
> (b) the duty to report corporate financial and operational results accurately and fairly; and
>
> (c) the duty to utilize the financial and human resources of the corporation for the best interests of the stockholders.

(Id. at 13-14.)

Regarding the alleged deprivation of property and money, Barford argues that the indictment fails to allege with sufficient specificity how the property loss occurred, how defendants' alleged plan was intended to cause a monetary or property loss, how falsely inflating Charter's revenue or subscriber numbers was intended to inflate Charter's stock price artificially, and how inflating the stock price would lead to a victim's deprivation of money or property and a benefit to Barford. He argues that artificially inflating the stock price would result in a monetary gain to the stockholder. Therefore, he contends that, to be deprived of money or property, the stockholder's value in their stock must be alleged to have resulted in a reduction of the stock value.

Defendant cites United States v. Telink, Inc., 702 F. Supp. 805, 808 (S.D. Ca. 1988), and United States v. Mariani, 90 F. Supp. 2d 574, 585-86 (M.D. Pa. 2000), for the proposition that the indictment must allege specifically how the property loss occurred.

In Telink, the court found the indictment insufficient under McNally v. United States, 483 U.S. 350 (1987). McNally held that the language of § 1341 covered only the protection of property rights which did not include honest government conduct. 483 U.S. at 358-60. The Telink indictment alleged,

> [defendants] knowingly and willfully devised and intended to devise a scheme and artifice to defraud and obtain money and property and deprive governmental entities of the honest and faithful service of employees, agents and consultants by means of false and fraudulent representations in connection with the sales of telecommunications equipment . . . .

702 F. Supp. at 806. The court determined that the allegations regarding the deprivation of honest and faithful service, the primary foundation of the indictment, were outside the scope of § 1341, because of the earlier-decided McNally. The court then declared the remaining allegations regarding money and property flawed, because the indictment did not allege "with specificity, a scheme that would result in a money or property loss to the county." Id. at 809. The court surveyed several theories, but concluded that the indictment must allege more than the statute's bare words; it must explain "how the defendants' plan resulted in a property loss to the county." Id. at 808.[5]

Mariani involved the under-reporting of amounts of municipal waste received by a landfill over a period of years. Before trial, the district court concluded that the indictment sufficiently alleged the property interest in certain statutory fees and royalties but did not sufficiently allege certain "non-monetary" property interests. 90 F. Supp. 2d at 577. The court invoked Telink and repeated its conclusion that the indictment's allegation of merely the statute's words "did not give the government free

[5]On appeal, the Ninth Circuit affirmed the dismissal of the indictment because its allegation of a deprivation of honest and faithful government services was not the subject matter of § 1341. United States v. Telink, Inc., 910 F.2d 598, 600 (9th Cir. 1990) (per curiam). It also affirmed the district court's determination that the indictment was silent on the specifications of property interests that the government asserted post-indictment. Id. To the extent that the district court indicated that § 1341 requires the scheme to have resulted in an actual property loss, the Ninth Circuit concluded that the statute has no such requirement. Id. at 599. Such is also the law in the Eighth Circuit. See, e.g., United States v. Ross, 210 F.3d 916, 923 (8th Cir.), cert. denied, 531 U.S. 969 (2000); United States v. Jain, 93 F.3d 436, 442 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997).

[rein] to define the alleged objects of the scheme." Mariani, 90 F. Supp. 2d at 586. This is because the Constitution requires that the indictment allege what the grand jury found to be the "species of property [that] was the object of the scheme." Id. In that case the indictment did not specify the "precise objects of the alleged scheme to defraud." Id. at 578.

The Eighth Circuit has stated that an indictment for mail fraud must "allege that the injured party has been deprived of something that fairly deserves the label of property under traditional usage." United States v. Granberry, 908 F.2d 278, 280 (8th 1990), cert. denied, 500 U.S. 921 (1991). The subject property need not be intangible. Carpenter v. United States, 484 U.S. 19, 25 (1987) ("*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights."). One district court listed exclusivity and transferability as two hallmarks of traditional property rights. United States v. Alsugair, 256 F. Supp. 2d 306, 313 (D.N.J. 2003).

In United States v. Shyres, 898 F.2d 647 (8th Cir. 1990), the Eighth Circuit affirmed a mail fraud conviction, the trial judge having defined "property rights" for the jury as follows:

> The term "property rights" as used in the mail fraud statute includes intangible as well as tangible property. Intangible property rights include any valuable right considered as a source of wealth, and include the right to exercise control over how one's money is spent.

898 F.2d at 652. The trial evidence was sufficient to support a finding that the defendant's actions caused the corporate victim to pay money based on false invoices, regardless whether the company was deprived of services for which it paid on the invoices. Id.

In Granberry, the Eighth Circuit reversed the dismissal of an indictment which alleged that the defendant school bus driver had falsified his application for a state driver's permit by concealing that he had a first degree murder conviction. 908 F.2d at 280-81. The indictment alleged property deprivations of the State of Missouri and the Normandy School District. The alleged deprivation

of property of the state dealt with its control of how it processes permit applications, the costs of processing a fraudulent application, the exclusive control over who gets the permits, and the permit as a physical piece of paper. Id. at 279-80. The court held that, while the permit was property in the permitee's hands, the licensing authority had no sufficient property interest in it under § 1341. Id. at 280. The court, however, determined that the indictment sufficiently alleged that the school district, which paid the defendant for his services, was deprived of its right to control its expenditures, a hallmark of Shyres, which was handed down after the trial judge had dismissed the indictment. Thus, the case was remanded. Id. at 281.

In United States v. O'Hagan, 139 F.3d 641 (8th Cir. 1998), the court held the mail fraud allegations in the indictment sufficient and affirmed the conviction. After invoking the rule that a hyper-technical reading of indictment allegations should be avoided, the court held that the defendant defrauded the alleged victims of property under the mail fraud statute. Id. at 651-52. Defendant had learned of nonpublic information about a corporate tender offer and purchased stock in the target company. The court held that, even though the term "property" was not used in the indictment, the alleged confidential business information was property under the mail fraud statute. Id. at 651.

Taking guidance from Shyres, Granberry, and O'Hagan, the undersigned believes that the instant indictment's allegations that defendants' actions intended an artificial inflation of Charter stock sufficiently allege a scheme to defraud the alleged victims of money and property, tangible and intangible. Moreover, Barford's suggestion that artificially inflated stock prices would not involve a loss of property or money is not persuasive. Cf. Gebhardt v. ConAgra Foods, Inc., 335 F.3d 824, 831 (8th Cir. 2003) ("Paying more for something than it is worth is damaging.").

Because Barford's attack on the conspiracy count relies on the faulty assumption that the mail and wire fraud counts are insufficiently alleged, the conspiracy count should remain.

Barford next argues that the indictment does not allege that he intended to obtain for himself the property which is the subject of the alleged deprivation, citing Monterey Plaza Hotel Ltd. P'ship v. Local 483, Hotel Employees & Rest. Employees Union, 215 F.3d 923, 926 (9th Cir. 2000), or how the deprivation of their honest services would personally benefit defendants, citing United States v. Bloom, 149 F.3d 649, 656-57 (7th Cir. 1998); United States v. Czubinski, 106 F.3d 1069, 1077 (1st Cir. 1997).

The government argues that Barford misreads the applicable case law. In post-McNally cases, the Third, Seventh and Tenth Circuits have not required intended personal gain as an element of mail or wire fraud. See, e.g., United States v. Welch, 327 F.3d 1081, 1104 (10th Cir. 2003); United States v. Syme, 276 F.3d 131, 142 n.3 (3d Cir.), cert. denied, 537 U.S. 1050 (2002); United States v. Stockheimer, 157 F.3d 1082, 1087 (7th Cir. 1998), cert. denied, 525 U.S. 1184 (1999); United States v. Ross, 77 F.3d 1525, 1543 (7th Cir. 1996).

Barford's reliance on Monterey Plaza Hotel, an appeal from the dismissal of a complaint alleging violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, et seq., is not well founded. In that case, the Ninth Circuit affirmed the district court's conclusion that the plaintiff failed to state the requisite predicate acts of mail and wire fraud, because the defendant's alleged activity, which included picketing and intimidation, may have been "vexatious and harassing, but it was not acquisitive." 215 F.3d at 926-27.

Bloom and Czubinski, cited by Barford for the proposition that personal gain by the defendant is a necessary element of an intangible rights scheme, are not convincing cases. Bloom was a Chicago alderman who, as an attorney, advised clients how to avoid city taxes by an illegal act. 149 F.3d at 651. The Seventh Circuit held that the indictment alleged no more than a breach of the fiduciary duty in the aldermanic relationship between Bloom and Chicago; there was no allegation of personal gain related to the aldermanic relationship. The court stated, "[a]n employee deprives

his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain." Id. at 656-57.

In what the undersigned finds to be a persuasive decision, United States v. Panarella, 277 F.3d 678 (3d Cir.), cert. denied, 537 U.S. 819 (2002), the Third Circuit delineated several problems with Bloom's definition of honest-services fraud as limited to the notion of misuse of office for personal gain. First, the appellate court believed that the notion added little clarity to the scope of § 1346. For example, Panarella, who was convicted of being an accessory after the fact to a wire fraud scheme, contended that because there was no allegation in the superseding information that the wire fraud schemer sold his vote there was no misuse of office for personal gain, whereas, the government responded that the schemer misused his office for personal gain because he concealed a financial interest while taking discretionary action directly benefitting that interest. Id. at 691-92.

Second, the Third Circuit found that the personal-gain standard risked being both over-inclusive and under-inclusive as a limiting principle. Id. at 692. It was too narrow, the court explained, because "nondisclosure of a conflict of interest in a fiduciary setting falls squarely within the traditional definition of fraud, and poses a similar threat to the integrity of the electoral system as that posed by misuse of office for personal gain." Id. On the other had, it warned that, "to the extent that 'misuse of office for personal gain' would envelop anyone from an elected official who uses his position of power to seduce a young intern to a Senator who takes home pencils from the office supply cabinet for personal use, the standard is too broad." Id.

Finally, the Third Circuit noted that although Bloom stated that "'[n]o case we can find in the long history of intangible rights prosecutions holds that a breach of fiduciary duty, without misuse of one's position for private gain, is an intangible rights fraud,' [149 F.3d] at 656, such cases do exist, even in the Seventh Circuit." Panarella, 277 F.3d at 692 (citing United States v.

Bush, 522 F.2d 641 (7th Cir. 1975), and United States v. Espy, 989 F. Supp. 17 (D.D.C. 1997), rev'd in part on other grounds, 145 F.3d 1369 (D.C. Cir. 1998)).

Czubinski involved an IRS employee who violated IRS rules by accessing and observing certain confidential taxpayer information. The court held that the law required that the defendant's acts deprive a victim of some "intangible property interest" or result in some gain to the defendant. 106 F.3d at 1074. There was no proof that Czubinski's actions either deprived the IRS of its use of the information or resulted in any gain to him. Id. at 1074-75. The First Circuit emphasized that it could not be found that Czubinski intended to receive any tangible benefit. Id. at 1077.

In the instant case the indictment alleges not only an intangible rights theory; it alleges defendants falsely inflated Charter's publicly reported year-end revenue and operating cash flow and made false statements relating to the inflated revenue and operating cash flow in order to inflate artificially Charter's stock price. Moreover, intended personal gain is not among the essential elements of mail and wire fraud. See, e.g., Frost, 321 F.3d at 740-41.

Even if intended personal gain were an essential element, the indictment would still be legally sufficient on its face, because it alleges that Barford "held significant interest in Charter stock" (Doc. 1 ¶7), which, in paragraphs 17 and 44, is alleged to have been artificially inflated in value. All defendants are alleged to have received stock options as compensation. (Id.) Thus, it could be found that they intended to receive tangible benefits.

Accordingly, this motion to dismiss should be denied.

B. Barford's second motion to dismiss

In his second motion to dismiss, Barford argues that Counts VII through XIV should be dismissed because they contain legally insufficient allegations of the scheme "to deprive Charter and its stockholders of their material and intangible rights to the

defendants' and other employees' honest services." (Doc. 1 ¶45.) He argues that, because the indictment alleges facts indicating Charter's corporate executives and its stockholders were aware of the fraudulent "managing" or "holding" of service disconnects,[6] he cannot be charged with defrauding them of the intangible right to his honest services. He also argues that information alleged in the indictment and the other proffered documents prevents the government from satisfying its burden of proving that he intended to defraud Charter, that he made misrepresentations to its "decision makers," and that those misrepresentations had a "natural tendency to influence those Charter decision makers." (Doc. 152 at 8.)

In response to this motion, the government argues that, in considering imputed corporate knowledge, Barford has misperceived the distinction between legal and illegal actions of a corporate officer, i.e., if the corporate officer acted illegally, his knowledge could not bind the corporation. Thus, the government maintains that Barford's interpretation of the indictment does not eliminate the scheme or conspiracy, but rather adds more

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[6]Barford points out that Indictment paragraph 51 alleges:

> 51. It was also a part of the scheme that at a meeting on September 14, 2001, attended by numerous Charter executives, Barford and Kalkwarf presented information that Charter had between 60,000 and 90,000 managed disconnects. Then on October 9, 2001, the new Chief Executive Officer's first day of employment at Charter, Barford and Kalkwarf falsely represented in a meeting with the new Chief Executive Officer and two members of Charter's Board of Directors that Charter had only 25,000 managed disconnects, when defendants knew that the number of managed disconnects was actually significantly larger.

He then points to Count XIV Overt Act paragraphs 76(E), 76(G), 76(I), 76(K), 76(L), and 76(M), and seven extra-indictment documents, all of which he argues "necessarily envelop[ed] Mr. Barford's superiors, the Board of Directors, and the majority shareholder of Charter with full and complete knowledge of Mr. Barford's actions which have now been characterized by the Government as misrepresentations." (Doc. 152 at 6.)

coconspirators. The government next criticizes as unsupported by case law Barford's argument that, because some shareholders may have known of the fraud, all shareholders must be held to have been directly informed of the actions against him. The government asserts that, if just one stockholder was not provided accurate information, the indictment would be sufficient.

Next, the government argues that Barford's references to evidence not within the four corners of the indictment must be disregarded. In addition, the government argues that Barford's claim that the indictment alleges he told others of the fraudulent practice is not supported by the words of the indictment. Finally, the government argues that the two fraudulent practices set forth in paragraph 56 of the indictment are sufficient by themselves to support paragraph 44's "honest services" allegations.

The instant motion to dismiss should be denied. First, it overlooks the basic legal premise that a corporation's identity and existence in the law is incorporeal and independent of its officers, employees, directors, and shareholders. Sargent v. Commissioner, 929 F.2d 1252, 1259 (8th Cir. 1991); R. H. Bouligny, Inc. v. United Steelworkers of Am., 336 F.2d 160, 161 (4th Cir. 1964) (citing Bank of the United States v. Deveaux, 9 U.S. 61 (1809)), cert. denied 379 U.S. 958 (1965). Second, it is not a defense in a case such as this that corporate executives condoned the actions of the defendants. United States v. Josleyn, 99 F.3d 1182, 1194 (1st Cir. 1996), cert. denied, 519 U.S. 1116 (1997); cf. United States v. Josleyn, 206 F.3d 144, 154 n.10 (1st Cir. 2000) (and cases cited thereat). Finally, it is in the nature of a pretrial motion for summary judgment on the merits of the plaintiff’s allegations in a civil action. See United States v. Ferro, 252 F.3d 964, 968 (8th Cir. 2001) (in federal criminal cases there is no corollary to Federal Rule of Civil Procedure 56), cert. denied, 534 U.S. 1083 (2002); see also United States v. DeLaurentis, 230 F.3d 659, 661 (3d Cir. 2000); United States v. Jensen, 93 F.3d 667, 669 (9th Cir. 1996); United States v. Critzer, 951 F.2d 306, 307 (11th Cir. 1992) (per curiam). If there is merit

in Barford's argument, relief must await the trial judge's ruling on a motion for acquittal at the close of the government's case. See Fed. R. Crim. P. 29; Ferro, 252 F.3d at 968.

C. Kalkwarf's motion to dismiss

Kalkwarf argues that the portions of Counts I through XIII that allege deprivation of the "intangible right to honest services" under § 1346 must be dismissed, because § 1346 is unconstitutionally vague on its face and as applied. (Doc. 90.)

> A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.

Hill v. Colorado, 530 U.S. 703, 732 (2000); accord United States v. Cuervo, 354 F.3d 969, 998 (8th Cir. 2004).

First, the Due Process Clause of the Fifth Amendment prohibits the enforcement of a statute the language of which is so vague that people of ordinary intelligence must guess at its meaning and differ as to its application; laws must be clear enough for people to know what is prohibited so that they can act accordingly. United States v. Washam, 312 F.3d 926, 929 (8th Cir. 2002).

In the constitutional analysis there is a strong presumption that each Act of Congress is not unconstitutionally vague merely because the defendant's acts do not fit easily within the statute's language. United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32 (1963). And "[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." Washam, 312 F.3d at 929 (quoting United States v. Mazurie, 419 U.S. 544, 550 (1975)).

Kalkwarf argues that, because § 1346 fails to define "honest services" and there is no established plain meaning or legal meaning of the term, its scope is unconstitutional because it is potentially unlimited. The undersigned disagrees.

The Second Circuit, in United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003) (en banc), petition for cert. filed, 72 U.S.L.W. 3634 (U.S. Mar. 29, 2004) (No. 03-1375), held that § 1346 was not unconstitutional when applied to the facts of that case. In that case the defendants, who were lawyers, arranged for payments to insurance company adjusters to expedite settlement of their clients' claims. The insurance companies had written policies prohibiting adjusters from accepting any gifts or fees. Ultimately, a superseding indictment charged the defendants with scheming to deprive the insurance companies of the intangible right of the honest services of their employee adjusters by using the mail and wire communications. Id. at 127.

The Second Circuit determined that the proper analysis, because the case lay outside a First Amendment context, was to determine whether § 1346 was unconstitutional as applied to the facts at hand, to see whether that case fit one of the factual scenarios approved by courts before McNally v. United States, 483 U.S. 350 (1987) (the deprivation of "honest services" was outside the scope of the mail fraud and wire fraud statutes). Congress had responded to McNally by passing § 1346 to reinstate the intangible rights doctrine as it included honest services. Rybicki, 354 F.3d at 134. In doing so, the court analyzed pre-McNally cases involving bribery, kickbacks, and self-dealing and concluded that the defendants' actions sufficiently fit the scheme of these cases and that the statute was not unconstitutionally vague.

Concurring, Circuit Judge Reena Raggi considered the plain meaning of the words used in § 1346, as displayed in commonly available dictionaries, and concluded that "'the intangible right to honest services' can fairly be understood to mean a legally enforceable claim to have another person provide labor, skill, or advice without fraud or deception." Id. at 153.[7] More specifically, she wrote:

[7]This holding and its following rationale answers defendant's argument that on its face § 1346 is reasonably indefinable.

> Indeed, implicit in the plain meaning of § 1346 are two limiting principles that serve notice on the public and guide the police as to the conduct proscribed. First, the law--whether federal or state, civil or criminal, tort or contract--must recognize an enforceable right to the services at issue. Second, Congress's decision to qualify the word "services" by the modifier "honest" indicates that not every breach of an employment contract or service agreement will support a federal fraud prosecution. What distinguishes "honest services" from the general provision of labor, skill, or advice is that the value of the particular services at issue largely depends on their being performed honestly, that is, without fraud or deception. An employer's right to the honest services of employees entrusted to disburse assets--as in the case of the insurance adjusters in the fraud scheme now before us--is an obvious example of conduct falling within the parameters of § 1346.
>
> Further, when § 1346 is read together with § 1341 and § 1343, three additional elements define and limit the conduct proscribed: a defendant must specifically intend to harm or injure the victim of the fraud scheme; he must misrepresent or conceal a material fact, *see Neder v. United States*, 527 U.S. 1, 22 . . . (1999); and the mails or wires must be used to further the scheme.

Id.

Thus, the court must look to the instant indictment to see (1) whether it alleges a relationship by which Charter and its stockholders had an enforceable right to defendants' services; (2) whether the value of those services largely depended on their being performed without fraud or deception; (3) whether defendants are alleged to have intended to harm or injure the alleged victims of the fraudulent schemes; (4) whether defendants are alleged to have misrepresented or concealed a material fact; and (5) whether they are alleged to have used the mails or the wires to further their schemes. Defendants do not make any substantial argument that factors (4) and (5) play a role in their constitutional analysis.

Regarding the first question, the indictment alleges that each defendant was an employee of Charter. Clearly, this employment relationship involved defendants providing services to Charter directly and to its shareholders indirectly. Regarding the second

question, it cannot be gainsaid that, under the regulatory provisions of the securities laws and Securities and Exchange Commission regulations alleged in the indictment, the quality (and, hence, value) of defendants' work, as officers of a publicly traded corporation, depended in substantial part upon their performing their duties without fraud or deception.

Perhaps the most critical of the five relevant factors is whether defendants are alleged to have intended to injure or harm the victims of the schemes. The indictment in paragraphs 17 and 44 alleges that defendants intended to defraud investors in Charter securities and the investing public of money and property and to deprive Charter and its stockholders of their rights to defendants' and others' honest services.

Kalkwarf argues that § 1346 is unconstitutional in its application to this indictment, because, although the indictment alleges a private employment context, it does not allege that he had a private or non-corporate purpose or sought to benefit personally from the alleged schemes. He argues that in this respect the statute's application to the facts alleged in this indictment was unforeseeable and, thus unconstitutional, because the statute fails to give fair notice of what it prohibits. See Bouie v. City of Columbia, 378 U.S. 347, 350-52 (1964).

In a memorandum filed by Kalkwarf (and joined by Smith (Doc. 203) and Barford (Doc. 205)) advising the court of supplemental authority, defendants urge the court to consider United States v. Graham, No. 03-CR-89 (D. Colo. Mar. 25, 2004) (granting motion for acquittal under Federal Rule of Criminal Procedure 29(a) on basis that § 1346's "honest services" provision is unconstitutionally vague as applied to the theory of prosecution and facts of the case). (Doc. 198 & Ex. 1 at 3-5.)

The undersigned is not persuaded by Kalkwarf's arguments.

First, § 1346 imports into the mail fraud and wire fraud statutes the element of acts which "deprive another of . . . honest services." 18 U.S.C. § 1346. There is no express, concomitant statutory requirement of personal gain. United States v.

Stockheimer, 157 F.3d 1082, 1087 (7th Cir. 1998), cert. denied, 525 U.S. 1184 (1999). And there is no requirement that the defendants' actions result in a transfer of any kind. United States v. Gray, 96 F.3d 769, 774 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997). Even if there were such statutory requirements of personal gain or transfer of value, the indictment alleges that defendants' actions artificially inflated Charter's stock price, that all four defendants had "substantial compensation packages that included salaries, bonuses, stock options and forgivable loans," and that Barford, Kalkwarf and McCall held significant interests in Charter stock." (Doc. 1 ¶7.)

Kalkwarf next adverts to the indictment's allegations that defined defendants' "honest services":

> (a) the duty to conduct the business of the corporation in an honest fashion;
>
> (b) the duty to report corporate financial and operational results accurately and fairly; and
>
> (c) the duty to utilize the financial and human resources of the corporation for the best interests of the stockholders.

(Id. ¶¶ 17, 44.) He argues that for the court to endorse these duties as components of honest services would be an impermissible judicial gloss on the wire and mail fraud statutes as supplemented by § 1346, with no legal indication of Congressional intent. The undersigned again disagrees.

Any reasonable person would understand that defendants' employment by Charter obligated them to perform the following services: (a) to conduct the business of the corporation, (b) to report the financial and operational results, and (c) to use the corporation's financial and human resources. Indeed all three of these facets of an executive employee providing services to his corporate employer are subsumed in Charter's obligations under the securities laws and regulations alleged in paragraph 8 of the indictment. Further, any reasonable person would understand that

to perform these services honestly, one would be expected to perform them without fraud or deception, accurately and fairly, and for the best interests of the stockholders.

Having considered Graham, the undersigned is not persuaded, because that out-of-circuit, district court case (1) avoids Rybicki by calling it "sui juris" and not addressing it otherwise, (2) does not consider Judge Raggi's well-reasoned analysis, (3) is procedurally distinguishable because it came at the close of the government's case-in-chief and was based on "the evidentiary record," and (4) was influenced by the government's "confession" that it struggled to understand the meaning of the right to honest services in the context of the case. (See Doc. 198 Ex. 1 (Graham) at 4-5.)

Kalkwarf also argues that the alleged schemes to obtain money and property are legally insufficient, because they do not allege that he intended to obtain money or property from the alleged victims (and what the nature of the money or property was), i.e. the investors in Charter securities and the investing public. The undersigned disagrees. The indictment alleges that Charter is a publicly traded company (Doc. 1 ¶ 7), and that defendants "devised . . . a scheme to defraud investors . . . of money and property . . . by falsely inflating Charter's [financial data] . . . in order to inflate artificially Charter's stock price. . . ." (Id. at ¶¶ 17, 44.) A reasonably intelligent person would understand that to act to artificially[8] inflate[9] the value of a publicly traded

[8]The term "artificial" is one of a group of words "that mean not genuine." The American Heritage Dictionary of the English Language 75 (Houghton Mifflin Co. 1969).

[9]In economics, to inflate means "to raise or expand abnormally." Id. at 674.

company, as alleged, is to act to defraud[10] those who own and invest in such stock.

Kalkwarf also argues that the indictment fails to allege specifically how the generally alleged "false and fraudulent pretenses, representations and promises" were material. This argument is gainsaid by the allegations of paragraphs 8 (describing the securities laws' and regulations' requirements), 9 and 20 (identifying Charter's public accounting firm), 10 (describing the factors relied upon by stock analysts with whom Charter regularly communicated), 11 (defining "operating cash flow"), 12 (defining "revenue"), 13 (defining "subscriber growth" and "internal subscriber growth"), and 16-18, 44, 46, 48, and 55 (specifically alleging actions of defendants which are consistent with the alleged intent to defraud).

For these reasons, the undersigned concludes that § 1346 is not unconstitutional and that Counts I through XIII are legally sufficient on their face. Per force, defendant's argument--that the conspiracy charged in Count XIV must be dismissed because it is based on the insufficiently alleged scheme to defraud charged in Counts VII through XIII--fails.

D. Bill of particulars

Kalkwarf moved for a bill of particulars on August 29, 2003 (Doc. 58), and again on October 29, 2003 (Doc. 108). Smith also requested a bill of particulars. (Doc. 67.)

Kalkwarf seeks specification of the following information:

1. Identification of the specific figures contained in the press releases and documents sent to the SEC that the government alleges were "falsely" or

[10]"The crime of mail fraud is broad in scope and its fraudulent aspect is measured by a nontechnical standard, condemning conduct which fails to conform to standards of moral uprightness, fundamental honesty, and fair play." Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 991 (8th Cir. 1989). An "intent to harm is the essence of a scheme to defraud." United States v. Ervasti, 201 F.3d 1029, 1035 (8th Cir. 2000).

"fraudulently inflated" as alleged in paragraphs 28, 47, 54, 58, 61, 63, 65, 67, 71, 73, 75, and 76. A., B., D., F., O., and P.

2. The identity of the "senior level employee" referred to in paragraphs 16, 19, 22, 23, 24, 25 and 26 of the indictment.

3. The identity of the "Charter senior executive" who is referred to in paragraphs 76. E., G., I., J., K., and M. of the "Overt Acts" section of the indictment that purports to detail alleged overt acts in furtherance of the conspiracy.

4. The identities of the known unindicted co-conspirators referred to in paragraph 75 of the indictment.

5. Whether the allegations in paragraphs 17 and 44 regarding a deprivation of money and property are asserting an actual deprivation of money and property or an intended deprivation of money or property.

6. To the extent the government contends that there was an actual deprivation of money and property, the identities of the individuals or entities that were deprived of money and property as alleged in paragraphs 17 and 44.

7. Identification of the specific money and property referred to in paragraphs 17 and 44 that were purportedly the object of the alleged fraud.

8. Specification of how the conduct alleged in the indictment, i.e., the inclusion of "fraudulently inflated" figures in press releases and documents sent to the SEC, is causally related to any purported deprivation of money or property.

9. The source of the duties alleged in ¶¶ 17(a), (b), (c) and ¶¶ 44(a), (b), (c) that are claimed to be owed to Charter and its stockholders as part of their intangible rights to honest services.

(Docs. 58, 108.)

Kalkwarf maintains that the information he seeks falls into five categories:

> (1) identification of the specific numbers alleged to be "fraudulently inflated" in certain press releases and SEC filings that are referenced in the indictment; (2) identification of certain unnamed individuals and purported unindicted co-conspirators that are referenced in the indictment; (3) disclosure of whether the government contends an actual deprivation of money or property occurred and identification of the purported "victims" of such deprivation; (4) the specific "money and property" that was the object of the alleged scheme and the nexus between the alleged scheme and that specific property; and (5) the source of the duties that are claimed to be owed to Charter and its stockholders as part of their intangible rights to honest services.

(Doc. 108 (Mem.) at 1-2.)

In his request, Smith seeks nineteen pieces of evidentiary detail, including definitions of words. Finally, he desires to adopt by reference and incorporate Kalkwarf's request for a bill of particulars. (Doc. 67.)

The government responds that Kalkwarf's and Smith's requests and motion for a bill of particulars should be denied, because the indictment and discovery are sufficient to allow defendants to prepare for trial, minimize the danger of surprise at trial, and plea their convictions in bar of another prosecution for the same offense. (Doc. 121.)

"The court may direct the filing of a bill of particulars." Fed. R. Crim. P. 7(f). "A bill of particulars serves to inform the defendant of the nature of the charge against him with sufficient precision to enable him to prepare for trial, to avoid or minimize the danger of surprise at trial, and to enable him to plead his acquittal or conviction in bar of another prosecution for the same offense when the indictment is too vague and indefinite." United States v. Hernandez, 299 F.3d 984, 989-90 (8th Cir. 2002), cert. denied, 537 U.S. 1134 (2003). Pretrial discovery of evidentiary details, however, is not the intended purpose of a bill of particulars. United States v. Wessels, 12 F.3d 746, 750 (8th Cir. 1993), cert. denied, 513 U.S. 831 (1994). The court has broad discretion in granting or denying a bill of particulars. United States v. Sileven, 985 F.2d 962, 966 (8th Cir. 1993).

In this case, the indictment substantially follows the words of the relevant statutes and informs Kalkwarf and Smith of the charges against them with sufficient particularity to allow them to prepare their defenses. Moreover, a bill of particulars is not the proper vehicle for requests for definitions of words beyond their plain meaning. See United States v. Smallwood, 443 F.2d 535, 540-41 (8th Cir.) (affirming the denial of a bill of particulars that requested an explanation of the term "accumulated loss"), cert. denied, 404 U.S. 853 (1971). Requiring the government to provide a bill of particulars would serve no legitimate purpose as Kalkwarf and Smith should be capable, from the discovery materials provided, of determining the information relevant to the alleged offenses.

E. Indictment surplusage

Smith has moved to strike as surplusage (Doc. 141) any reference to him in indictment paragraph 7, which alleges that, "[a]s a result of their employment at Charter, Barford, Kalkwarf, McCall and Smith were all provided substantial compensation packages that included salaries, bonuses, stock options and forgivable loans," and that "Barford, Kalkwarf and McCall held significant interests in Charter stock" (Doc. 1 at 2.) Smith maintains that paragraph 7 is irrelevant because it does not describe essential elements of wire fraud and conspiracy, and is inflammatory and prejudicial. He maintains that the government seeks to "trade upon the public's feeling of outrage at executives of other corporations in other cases who are alleged to have converted corporate assets to their personal benefit." (Doc. 141.)

The government responds that (1) Smith incorrectly defines relevance as limited to language describing the essential elements of the crime alleged, (2) he cannot set forth a credible claim of prejudice, because he has not provided any support for his claim about trading on the public's feeling of outrage at executives, and (3) the sentence he challenges is not inflammatory. (Doc. 155.)

Smith replies that, because the indictment carefully distinguishes him from defendants who held "significant interests

in Charter stock" from which a benefit from a stock price spike might be realized, this distinction is crucial in that it leaves paragraph 7 alleging only that he was provided with a substantial compensation package, not that this compensation package was tied to the "Subscriber Inflation Scheme." Next, he argues that the government misstates the legal standards governing relevance for Rule 7(d) purposes. Finally, he asserts that it is common knowledge corporate scandals involving executive pay have become a large issue in recent years. (Doc. 162.)

"As a general rule, an indictment may not be amended." United States v. Ross, 210 F.3d 916, 922 (8th Cir.), cert. denied, 531 U.S. 969 (2000); accord Ex parte Bain, 121 U.S. 1, 7 (1887). On a defendant's motion the court may strike surplusage from the indictment. Fed. R. Crim. P. 7(d). But courts "should not excise part of the indictment lightly." United States v. Hitt, 249 F.3d 1010, 1031 (D.C. Cir. 2001). A Rule 7(d) motion "should be granted only where it is clear that the allegations contained therein are not relevant to the charge made or contain inflammatory and prejudicial matter." United States v. Figueroa, 900 F.2d 1211, 1218 (8th Cir.) (internal quotations omitted), cert. denied, 496 U.S. 942 (1990).

Smith's motion must be denied. Smith's contention--that "relevance" is determined by whether the language at issue describes the essential elements of the crime alleged--rests on United States v. Collins, 920 F.2d 619 (10th Cir. 1990). In Collins, the Tenth Circuit noted that "language in the indictment . . . describing the essential elements of the crime alleged is not surplusage and cannot be stricken under Rule 7(d)." Id. at 631. The Tenth Circuit did not rule that an indictment's allegations must be limited to the essential elements of the crime charged.

An Eighth Circuit case, United States v. Figueroa, 900 F.2d 1211, 1218 (8th Cir. 1990), is instructive on the issue of relevance. In Figueroa, the defendants objected to allegations of overt acts in a drug conspiracy charge. Id. The court clearly stated that the government was "not required to either allege or

prove that a conspirator committed an overt act." Id. Moreover, the court held that "the overt act allegations . . . were neither irrelevant nor inflammatory and prejudicial because they closely paralleled the evidence adduced at trial." Id.

In this case, the government has indicated that it expects to introduce evidence relating to Smith's compensation of a high salary, stock options, and bonuses. Because Smith has already claimed in court filings that he had no personal gain from the charged fraud and that he only committed the acts at the instruction of supervisors, the government argues, and the undersigned agrees, that such evidence would provide evidence of a motive to commit the fraud, i.e., personal gain. See United States v. Noland, 960 F.2d 1384, 1388 (8th Cir. 1992) ("evidence of . . . motive is generally admissible where relevant"). Whether such evidence ultimately might be excluded under Federal Rule of Evidence 403 is not an issue before the undersigned.[11]

Moreover, Smith's reliance on United States v. Spalding, 01-152-CR-01, 2002 WL 818129, at *5 (S.D. Ind. Apr. 24, 2002), as an example of a court's striking language from an indictment for failure to recite any of the essential elements of the charge is misplaced. While Spalding noted that paragraphs in the indictment's background section (which were stricken) did not recite any of the essential elements of the charge, the court also explained that the legal principles defined in those background paragraphs might "lead to confusion of issues"[12] and would be furnished in proper form to the jury in the final instructions. Id. In any event, introductory information may be particularly helpful. See United States v. Augustine Med., Inc., No. Crim. 03-321(1-8), 2004 WL 502183, at *4 (D. Minn. Mar. 11, 2004) ("in

[11]Smith states that "an evidentiary ruling is not necessary." (Doc. 162 at 3.)

[12]Spalding had objected to certain paragraphs as "inaccurate conclusions of law which would be prejudicial to the defendant." 2002 WL 818129, at *4. Smith does not contend that paragraph 7 contains inaccurate legal conclusions.

factually and legally complex cases, background information is particularly helpful for contextualizing the criminal conduct alleged"); United States v. Cisneros, 26 F. Supp. 2d 24, 55 (D.D.C. 1998) ("The Government is not required to provide a bare-bones Indictment; in fact, the opposite is encouraged."); see also United States v. Mulder, 273 F.3d 91, 100 (2d Cir. 2001).

At this early stage of the proceedings, it is not clear that paragraph 7 is not relevant to the charges made or contains inflammatory and prejudicial matter. See Dranow v. United States, 307 F.2d 545, 558 (8th Cir. 1962). The motion to strike surplusage, therefore, is denied without prejudice.

III. JOINDER AND SEVERANCE

Smith has moved for separation of the trial of Counts I through VI from the trial of Counts VII through XIV, or severance of his trial from the trial of Barford and Kalkwarf.[13] (Doc. 69.) Kalkwarf has moved to sever his trial from that of Smith on grounds of misjoinder (Doc. 149) and for separation of the trial on Counts I through VI from Counts VII through XIV (Doc 150). Barford has also moved to sever his trial from Smith's trial. (Doc. 154.)

In his motion, Smith asserts that the trial of "Revenue Enhancement Scheme" counts (Counts I through VI) should be separated from the "Subscriber Inflation Scheme" counts (Counts VII through XIV). First, he maintains the joinder in one trial of alleged schemes that involve a different series of acts and transactions violates Federal Rule of Criminal Procedure 8(b). He contends that the only commonalities between the two schemes are that they allegedly occurred at Charter and that Barford and Kalkwarf were allegedly the architects of both schemes. (Doc. 69 at 1-2, 5-8.) Second, he contends that limiting and cautionary

[13]Barford requested leave to join in Kalkwarf's motion to dismiss. (Doc. 87.) The court sustained Barford's motion but directed him to advise the court of entitlement to relief by reason of the court's ruling of the subject motion. (Doc. 119.) He has not done so.

instructions would be insufficient, and that separate trials would be necessary, to allay the inherent prejudice of trying the two alleged schemes together. (Id. at 2-3, 12-13.)

Kalkwarf argues in his misjoinder-based motion that he will be prejudiced if he is tried jointly with Smith, because (1) there is an irreconcilable conflict between his and Smith's defenses, i.e, Smith maintains that he merely followed the directions of his superiors, whereas Kalkwarf maintains he gave no orders to Smith, and (2) a joint trial will result in conflicts between the respective constitutional rights of these defendants. (Doc. 149.) In his motion for separate trials, Kalkwarf makes arguments similar to those of Smith. (Doc. 150.)

In his motion, Barford seeks to sever his and Smith's trials. He maintains his rights under the Confrontation Clause will be violated if Smith's incriminating extrajudicial statements are admitted into evidence in a joint trial. He also contends that redaction and a limiting instruction will not ameliorate this constitutional error. Finally, he adds that any proposed redaction of FBI Special Agent Coates's testimony or the written FBI 302 reports would materially strip Smith's statements to the core and violate the rule of completeness reflected in Federal Rule of Evidence 106. (Doc. 154.)

The government opposes the three motions described above. (Docs. 167-68.) It maintains joinder is proper under Rule 8(b) "in that the indictment charges a series of acts or transactions in which all defendants participated and which had the effect of overstating Charter's operating results during the period August 2000 through March 2002." It adds,

> [t]he language of [the] charging paragraphs [(paragraphs 17 and 44)] is virtually identical, with the exception of the allegations as to how the scheme to defraud was carried out. The purpose of the fraud alleged is the same--"to defraud investors in Charter securities and the investing public of money and property by means of materially false and fraudulent pretenses, representations and promises." The alleged goal is the same--"to inflate artificially Charter's stock price, and

> to deprive Charter and its stockholders of their material and intangible rights to the defendants' and other employees' honest services." The honest services of which Charter and its stockholders were deprived are alleged identically in both counts.

(Doc. 168 at 4.) Moreover, the government anticipates that the proof it will present regarding the two charged schemes--i.e., evidence about Charter, its business operations, its accounting practices, its relationships with Wall Street and industry analysts, its corporate culture, and its continuing emphasis on meeting stock analysts' projections of its operating results--will overlap substantially. In addition, the government asserts that the Eighth Circuit has upheld the joinder of defendants under Rule 8(b) in cases in which the proof at trial involved charges more separated than those in this case. (Id. at 5-6.) Finally, the government argues that, even if the counts were severed, evidence of each scheme would be admissible at the trial of the other scheme under Federal Rule of Evidence 404(b). (Id. at 7-9.)

Defendants have also replied to the government's responses. (Docs. 175, 178-79.) Smith maintains that "the two schemes involve different sets of actors engaging in different conduct at different times for different reasons, with no concrete facts to patch the two schemes together." (Doc. 170 (Mem.) at 2.)

In determining whether any defendant is entitled to a separate trial, the court must decide whether joinder (1) was proper under Rule 8(b), and (2) is likely to have a "substantial and injurious effect or influence in determining the jury's verdict." United States v. Lane, 474 U.S. 438, 449 (1986) (internal quotations omitted).

> Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. P. 8(b). "Rule 8(b) requires that there be some common activity involving all of the defendants which embraces all the charged offenses even though every defendant need not have participated in or be charged with each offense." United States v. Bledsoe, 674 F.2d 647, 656 (8th Cir.), cert. denied, 459 U.S. 1040 (1982); accord United States v. Quiroz, 57 F. Supp. 2d 805, 828 (D. Minn. 1999). The propriety of the joinder generally must appear on the face of the indictment. United States v. Wadena, 152 F.3d 831, 848 (8th Cir. 1998), cert. denied, 526 U.S. 1050 (1999); United States v. Andrade, 788 F.2d 521, 529 (8th Cir.), cert. denied, 479 U.S. 963 (1986).

There is a presumption that all charged co-conspirators should be tried together when the proof against each is based upon the same facts and evidence. See United States v. Frazier, 280 F.3d 835, 844 (8th Cir.), cert. denied, 535 U.S. 1107 (2002); United States v. Huff, 959 F.2d 731, 736 (8th Cir. 1991), cert. denied, 506 U.S. 855 (1992). "Once defendants are properly joined under Rule 8, there is a strong presumption for their joint trial, as it gives the jury the best perspective on all of the evidence and therefore increases the likelihood of a correct outcome." United States v. Flores, No. 03-2116, 2004 WL 691179, at * 5 (8th Cir. Apr. 2, 2004) (internal quotations omitted).

Misjoinder vel non is but one factor to assess in determining whether severance should be ordered. Joint trials are favored because they "conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial." Lane, 474 U.S. at 449 (internal quotations omitted). The court must look to defendant's showing that prejudice would result from joinder and consider whether such prejudice can be avoided at trial. Very often, relevant factors cannot be fully evaluated until during trial, such as the effect of limiting instructions or the strength of the government's evidence, and the number of defendants tried jointly. United States v. Sazenski, 833 F.2d 741, 745-46 (8th Cir. 1987), cert. denied, 485 U.S. 908 (1988).

Despite the preference for joint trials, if the joinder of offenses or defendants in an indictment appears to prejudice a defendant, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires. See Fed. R. Crim. P. 14(a); United States v. Zafiro, 506 U.S. 534, 539 (1993); United States v. Boyd, 180 F.3d 967, 982 (8th Cir. 1999).

In this case, the undersigned believes joinder is proper under Rule 8(b) because the indictment, in paragraphs 17 and 44, charges a series of acts or transactions in which all defendants participated and which had the same effect of overstating Charter's operating results.

Moreover, separate trials of counts or severance of defendants' trials is not warranted under Rule 14(a). Defendants have not shown the likelihood of severe or compelling prejudice. United States v. Pherigo, 327 F.3d 690, 693 (8th Cir.) ("the necessary prejudice must be 'severe or compelling'"), cert. denied, 123 S. Ct. 2663 and 124 S. Ct. 420 (2003). Moreover, "[t]he mere fact that one defendant tries to shift blame to another defendant does not mandate separate trials." Flores, 2004 WL 691179, at *5 (internal quotations omitted). "Similarly, the possibility that a defendant's chances for acquittal may be better in a separate trial is an insufficient justification for severance." Id. Conflicting or mutually antagonistic defenses are not be prejudicial per se. Zafiro, 506 U.S. at 539.

In addition, proper redaction of Smith's statement implicating Barford and Kalkwarf would deal effectively with the Sixth Amendment concerns addressed in Bruton v. United States, 391 U.S. 123, 126, 135-36 (1968). See United States v. Coleman, 349 F.3d 1077, 1085 (8th Cir. 2003) ("*Bruton* violations may be avoided through redaction if a cautionary jury instruction is given, if the redactions are neutral, and if they do not obviously directly refer to the defendant."); United States v. Webber, 255 F.3d 523, 526 (8th Cir. 2001) ("[T]he district court has broad discretion to

. . . choose among reasonable evidentiary alternatives to satisfy the rule of completeness reflected in Rule 106.").

IV. PRETRIAL SCHEDULING CONFERENCE

Pursuant to Federal Rule of Criminal Procedure 17.1, defendants Barford and Kalkwarf have moved for a pretrial scheduling conference to consider such matters as will promote a fair and expeditious trial. (Doc. 147.) The government does not oppose the motion but requests that any such conference be held after the pretrial motions have been ruled. (Doc. 161.) The motion will be deferred to the district judge.

V. EVIDENTIARY HEARING MOTIONS

A. Smith's motion to dismiss and to suppress evidence

Smith argues that the indictment against him should be dismissed, because in an immunity agreement into which he entered with the government, the government made a binding commitment of transactional immunity. He maintains that he honored his obligations under the immunity agreement, waiving his Fifth Amendment rights in the process. Alternatively, he moves to suppress statements made during an August 7, 2002 proffer meeting, pursuant to the immunity agreement. (Doc. 66.)

In connection with his aforesaid motion, Smith has also moved for in camera review of a Memorandum of Interview setting forth statements he made at the proffer meeting with the government. (Doc. 68.) The court ordered the submission to the court of this Memorandum of Interview for in camera review.

The government responds that (1) Smith was never promised immunity, (2) never fulfilled the alleged condition of the immunity agreement, i.e., "giving sufficient information to 'prove a case,'" and (3) his alternative request ignores the terms of the August 6, 2002 proffer letter, which state that the statements will not be used directly against Smith at any trial whether during the

government's case-in-chief, cross-examination, or rebuttal.[14] (Doc. 73.) Smith replies to the government's response. (Doc. 84.)

Following the evidentiary hearing the undersigned makes the following findings of fact and conclusions of law:

FACTS

1. James H. Smith, III, age 55, had been a resident of California. He is a Certified Public Accountant who, between September 2000 and December 2001, was employed by Charter as its Senior Vice-President of Operations in its Western Division.

2. On August 2, 2002, FBI Special Agent Zachary Coates and another agent went unannounced to Smith's residence then in a suburb of Denver, Colorado, to interview him about the "disconnect practices" at Charter. It was then very early in the government's investigation of Charter. Smith told the agents that he was a senior vice-president of Charter operations for the western division. The agents did not state to him that he was a target in their investigation due to his corporate position at Charter. Agent Coates told Smith that there were those in the Charter organization who would be held accountable for what happened and that the United States Attorney would decide where the line would be drawn. Coates never told Smith that his position at Charter would be an important factor in the decision of whether or not to prosecute him. Smith knew he had the constitutional right to remain silent, but he answered the agents' questions. When the agents left his residence, he telephoned his attorney, Neil Peck, and told him about the interview.

3. On August 5, 2002, Smith met with Peck at Peck's office in Denver, Colorado, and gave him a copy of a September 9, 2001 email, which described Charter's disconnect practices. The email, from a senior officer at Charter to Smith and others at Charter, discussed getting reportable financial results by "smoke and

[14]The government takes no position as to the motion for in camera review. (Doc. 72.)

mirrors." Peck told Smith that Smith appeared to have information that would be helpful to the government, might be a target of the investigation, and had the right to remain silent. Peck told Smith he would contact the government and request that Smith receive transactional immunity in exchange for his cooperation.

4. Thereafter on August 5, Peck telephoned Special Agent Coates and told him that Smith had more information, including a document that would assist the investigation, and that Smith would need to receive transactional immunity. Coates responded by telling Peck that whether or not Smith would receive transactional immunity was a decision for the United States Attorney's Office. Coates said he would forward the request to that office. Later that morning Coates passed the information to AUSA Rosemary Meyers in St. Louis.

5. Still later on August 5, Peck spoke by conference telephone call with United States Attorney Raymond Gruender and AUSAs Michael Reap, James Martin, Jeffrey Jensen, David Rosen, and Meyers, in St. Louis. Agents Coates and Howard Marshall also participated in the conference call. Martin had first become involved in the Charter investigation that day. Peck stated that he represented Smith, that Smith had very valuable information for the government, and that he thought Smith ought to receive transactional immunity for his cooperation. Peck was told that the government was in no position to grant Smith immunity at that time; rather, the prosecution staff would consider later what was to happen. Peck read part of the September 9 email that Smith had given him. Martin asked Peck whether Smith had information about Paul Allen, a Charter official, and whether Smith would be willing to wear a hidden electronic recording device in the government's investigation. Peck said that wearing a device was unnecessary for Smith to get transactional immunity, considering the nature of the information he had to give. In the discussion, Reap stated that Smith would not receive transactional immunity in that conversation; rather, consideration of extending transactional immunity to him would occur at a later date, after Smith made a

proffer of information. Peck, himself a former AUSA, stated he understood that. Martin stated that the government would send Peck a "proffer" letter. No one offered Smith transactional immunity in this conversation. No one stated that Smith's position with Charter was relevant or irrelevant to whether transactional immunity would be offered to him. A proffer interview was scheduled for August 7.

6. In an August 6, 2002 telephone conversation, Peck reported to Smith that he had contacted the government lawyers in St. Louis about transactional immunity, that the government was very interested in the information Smith could provide, that Smith's wearing a concealed eavesdropping device was suggested by the government, and that they wanted to meet with Smith on August 7 in Peck's office.

7. On August 6, 2002, AUSA Martin faxed to Peck a written letter outlining the government's position regarding Smith's cooperation and anticipated "proffer" of information. (Smith Ex. 3.) In pertinent part, Martin wrote to Peck:

> It is . . . our understanding that Mr. Smith . . . wishes to continue his cooperation with the Government in its investigation of possible violations of the federal criminal laws by Charter Communications, Inc. in return for transactional immunity. Before our office can consider granting your client immunity in this matter, we have requested a proffer from your client. . . .
>
> The purpose of this letter is to set forth the terms of the proffer agreement entered into between the United States of America, by its attorney, Raymond W. Gruender, United States Attorney . . ., and James G. Martin, [AUSA] for said district, and your client . . . .
>
> At this time, the Government agrees that any statements made by Mr. Smith during the proffer will not be used directly against him at any trial, whether during the Government's case in chief, cross-examination, or rebuttal. This agreement applies only to direct use of Mr. Smith's statements. Leads developed as a result of the proffer could be used in any potential prosecution against Mr. Smith. Additionally, were Mr. Smith prosecuted and he testified at trial contradicting statements made during the proffer, the proffer

> statements could be used as prior inconsistent statements. If your client fails to be completely truthful during the proffer, his statements could also be used against him.
>
> The information set forth above is fully and completely the substance of any agreement made between the parties. If this is agreeable to you and your client, please contact me immediately.

(Id.) Peck did not like the statement in the letter about leads being followed against the other Charter officials. He telephoned Martin to try to get this statement removed; Martin refused. Peck did not complain to Martin that the letter did not include criteria for Smith's entitlement to transactional immunity. Peck faxed Smith a copy of Martin's letter; he told Smith that he felt Smith had to accept those terms. Nowhere in this letter did Martin state that Smith's corporate position would be important in the decision whether to indict Smith. Arrangements were made for Martin to meet with Peck and Smith in Colorado the next day.

8. At 8:30 a.m., on August 7, 2002, Smith met with Peck in Peck's Denver office. Peck told Smith that, before he answered any of the government's questions, he would make it clear that Smith wanted transactional immunity, because his information could be helpful to the government. Smith knew he had the right to remain silent. They discussed how they believed the meeting with the government attorneys that day would proceed.

9. At 9:30 a.m., on August 7 in Peck's office conference room, with Peck[15] present, Smith met with AUSA Martin, Special Agent

[15]Upon motion of the United States (Doc. 91), the undersigned has received and reviewed in camera the original handwritten notes of attorney Peck of this meeting. These notes contain the following statements which Peck testified Martin made: "If we get sufficient info (sic) from you to prove a case we will give you the immunity requested" and " Doesn't care what you told Zach [(Special Agent Coates)] or NP [(Neil Peck)]. Only interested in what you say today."

Coates, and Inspector Boland.[16] Martin had not been expressly authorized by the United States Attorney's Office to offer transactional immunity at that time. After the introductions, Peck made an introductory statement about Smith's position and stated that Smith had very valuable information in exchange for transactional immunity. Peck and Martin discussed the contents of the proffer letter he had sent Peck. Martin stated that any immunity discussion beyond the written proffer letter would have to be made by the prosecutorial group in St. Louis. He did not have express authority to grant immunity to Smith at that time and made no statement describing any condition for a grant of immunity. Martin stated that there was information about improprieties involving the reporting of the numbers of subscribers and that Smith was involved. He told Smith that the government believed that Smith had relevant information, that others above him in the corporation have greater information, and that Smith could be indicted as a participant in criminal activity. Martin told Smith that he did not care what Smith had told Peck or the FBI previously; all he cared about was what Smith would tell him that day. Martin also stated that the government wanted to consider Smith's information before it decided whether to extend immunity to him. Martin never stated that Smith's title and position would be any factor or determinant, important or otherwise, in the government's decision to offer him immunity. He also never stated that transactional immunity would be extended to Smith if his information was sufficient to prove a case.[17] Thereafter, no government investigator interviewed Smith about the Charter matter.

10. Next, Smith and Peck met privately. They believed Smith's statements would merit transactional immunity. Therefore,

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[16]Upon motion of Smith, the undersigned has received and reviewed in camera the typewritten Memorandum of Interview written by Inspector Boland at this meeting. In it Boland did not record any conversation between Peck and Martin.

[17]In this respect the undersigned credits the testimony of Martin over that of Peck and Smith.

Smith decided to waive his Fifth Amendment right to remain silent and to cooperate with the government. Thereafter, Smith waived his right to remain silent and made statements to the prosecutor and the investigators. The proffer interview lasted approximately 6 hours, including lunch. When the interview ended, Peck asked Martin how long it would take for the government to decide whether to give Smith transactional immunity. Martin responded that this decision would take a couple of weeks. Peck was told that the decision whether to extend transactional immunity to Smith was not Martin's alone. Peck expressed his belief that Martin would have substantial influence when the decision was made.

11. Between August 7 and October 4, 2002, Peck and Martin spoke by telephone many times. Each time Martin reported to Peck that no decision had been made on whether Smith would be given immunity or would be prosecuted. On October 4 Martin told Peck that some in the United States Attorney's Office wanted to prosecute Smith because of his corporate position.

12. On October 7, 2002, Peck wrote Martin as follows:

> Thank you again for giving me last Friday [(October 4, 2002)] a candid status report regarding your office's investigation into possible financial accounting irregularities at Charter Communications. While Trey Smith and I remain disappointed that no decision has yet been made to grant Mr. Smith transactional immunity in return for his full and complete cooperation and testimony, we continue to hope that such a decision will be made in the relatively near future.
>
> Your statement that no information has come to your attention which contradicts what Trey Smith has told you reinforces our view that the information provided by Trey is truthful, credible and will provide a sound basis for a successful prosecution against the most senior officials of Charter Communications. In this connection, I would request that you remind any of your colleagues who may be opposed to giving Trey a "pass" that in addition to importance and truthfulness of his testimony, Trey . . . . With respect, giving due consideration to all of these factors seems to me to weigh conclusively against prosecution of Trey Smith . . . and in favor of giving him transactional immunity.

> If it would advance favorable consideration of transactional immunity for Trey Smith, we would be willing for him to be interviewed again, in St. Louis if necessary, under the same terms and conditions set forth in your letter dated August 6, 2002. We appreciate your efforts to bring our discussions to a satisfactory resolution.

(Smith Ex. 6.) The letter did not mention any promise by Martin to extend transactional immunity to Smith. In the months following this letter, Peck and Martin spoke several times; Martin called Peck on two occasions for information. In these conversations Peck asked Martin for information about whether Smith would be prosecuted. Martin responded that some in the office said Smith should be prosecuted because of his involvement in the criminal activity; he told Peck that the matter was still being debated.

13. During the week of March 3, 2003, Peck and Martin spoke by telephone about the issue of immunity for Smith. Martin told Peck that he had no information that would relieve him of his concern. Martin stated that other information indicated facts that Smith did not disclose in the August 7, 2002 interview. Peck passed this information on to Smith.

14. On March 10 Peck wrote Martin another letter which recounted the same reasons why Smith should get transactional immunity. Again, there was no mention of any promise by Martin to give immunity to Smith. (Smith Ex. 7.)

15. On June 2, 2003, Martin telephoned Peck. He told Peck that the government had decided to charge Smith. Peck asked what charges would be made. Martin responded there would be wire and mail fraud, but not securities fraud. In the conversation, Martin said the government had checked out Smith's information and found no contrary information. He offered Mr. Peck an opportunity to speak with United States Attorney Gruender. Peck said he wanted to speak with Smith first. Thereafter, Peck called Smith at his home and told him of the telephone conversation with Martin. Peck suggested that they meet with Mr. Gruender. Smith agreed.

16. On June 6, 2003, Mr. Peck met with Mr. Gruender, and AUSAs Meyers, Reap, Jensen, and Martin in the United States Attorney's Office in St. Louis. After the introductions, Peck made an opening statement from prepared notes stating the reasons why Smith should not be charged. Several times he stated that all of his dealings with Martin were professional and above reproach and that no promise of immunity had ever been made. Peck stated that Smith was entitled to more consideration of lenity than had been offered to other putative defendants. Reap stated that, because of Smith's corporate position, he would be charged. Peck stated that perhaps his and Smith's hopes had been too high and he was exploring another disposition of the case for Smith. Mr. Gruender stated that Smith would likely be indicted for a felony.

17. On June 11, 2003, Peck wrote to Messrs. Gruender and Martin:

> Thank you (and your colleagues . . .) for meeting with me last Friday about my client Trey Smith and the investigation into alleged irregularities at Charter Communications. I very much appreciate you giving me the opportunity to make the case that Trey Smith should not be indicted for a felony as a result of alleged wrongdoing at Charter. I remain deeply disappointed that while you purport to recognize the value of Trey's earlier cooperation with the Government . . . , you have offered Trey nothing different by way of a plea agreement than you have offered . . . .
>
> * * *
>
> I fully understand that the Government has no legal duty to be consistent in the approach it takes to dealing with financial fraud cases. And, of course, I know that you have great discretion in making prosecutional decisions . . . .
>
> * * *
>
> Accordingly, I earnestly and respectfully hope you will reconsider your position.

(Smith Ex. 8.) Nowhere in this letter does Peck argue that the government was obligated by agreement with Smith not to prosecute him in this matter.

18. On June 17, 2003, Peck and defense attorney Burton Shostak met in St. Louis with Mr. Gruender and AUSA Jensen. Martin participated in the conversation by conference telephone call. Shostak stated that Smith was no longer pursuing transactional immunity, but they were exploring other possibilities. Peck suggested a reason why Smith was not guilty of any crime involving materiality of statements, and he stated that he thought Smith was not getting the same opportunity to dispose of the case that had been offered to others. He stated his reasons why Smith was entitled to more consideration. In this discussion he never stated that Martin had offered Smith transactional immunity.

19. On June 19, 2003, Peck telephoned Martin and they discussed an indictment that included Smith as a defendant. In this conversation, Peck for the first time stated that his notes of the August 7, 2002 Denver meeting included a statement that Martin had promised transactional immunity if Smith provided information sufficient "to prove a case." Martin denied to Peck that he had ever made such a promise and reminded Peck of his statements to the United States Attorney that no such promise had been made.

20. On June 23, 2003, Peck wrote Martin another letter and stated reasons why Smith should not be charged with a felony; the letter also referred to Smith pleading guilty. He stated:

> When you met with my client Trey Smith on August 7, 2002 in connection with the Grand Jury investigation into alleged accounting irregularities at Charter Communications, you told Trey Smith during your preliminary remarks, and before he provided any information to you, that: **"If we get sufficient information from you to prove a case, we will give you the transactional immunity requested."** Your "proffer letter" to me dated August 6, 2002 (copy attached) makes clear that the interview with Trey Smith on August 7 was in connection with his request for transactional immunity.
>
> You have told me several times since informing me on June 2, 2003 that Trey Smith would be prosecuted, that the indictment in this matter will "tell the story" which Trey Smith told you on August 7, 2002. Clearly, therefore Trey Smith provided the Government with

> "sufficient information to prove a case" and satisfied the condition you set for granting him transactional immunity. I was, therefore, extremely disturbed to learn from you in our telephone conversation on June 19, 2003 that the Government had not considered your commitment to Trey Smith when it was deciding whether or not to prosecute him. Instead, you told me that the Government only decided "that Trey was too high in the organization to be given a pass." The Government was fully aware of Trey's position in Charter when it, *i.e.*, you, told him on August 7, 2002 that he would receive transactional immunity "If we get sufficient information from you to prove a case . . . ."
>
> In these circumstances, I believe the Government is obligated to give Trey Smith transactional immunity for anything he may have done while employed by Charter Communications. I do not write this letter to put you in an "awkward position" (your words in our conversation on June 19). Rather, it is clear that Trey Smith has been ill-served by the Government in this matter, and while there is still time for the Government to avoid making an egregious mistake, it should. Of course, Trey Smith will continue his full cooperation with the Government following the grant of immunity.

(Smith Ex. 9.)

21. By letter dated June 23, Martin responded to Peck's letter of the same day. In this letter, Martin denied the assertions Peck made in his letter, including denying making the "awkward position" statement Mr. Peck attributed to Martin. Further, Martin recounted that Mr. Peck, in his meetings with the United States Attorney and the other prosecutors, repeatedly stated that Martin had not made any promises to Smith about immunity. Martin stated that this was corroborated by the interested agents and attorneys reviewing their notes and finding no such statement by Martin. (Smith Ex. 10.)

22. By letter dated June 30, Peck replied to Martin's letter of June 23. In it he stated that he, too, reviewed his notes of the August 7, 2002 meeting and found in them the statement he attributes to Martin, "If we get sufficient information from you to prove a case, we will give you the [transactional] immunity requested," which Peck stated had been a previous topic of

conversation and letters. He provided Martin a redacted copy of his notes, showing the subject entry. In recounting the law supporting Smith, Peck repeated several times the quote next above. (Smith Ex. 11.)

23. In his letter dated June 30, 2003, Martin describes Peck's assertion about an express promise of transactional immunity as a new position which is at odds with the statements Peck made to the prosecutors in the United States Attorney's Office. Martin recounted other factors indicating that no such promise was made to Smith. (Smith Ex. 12.)

24. By letter to United States Attorney Gruender, dated July 2, 2003, Peck stated that he and Mr. Gruender had a difference of opinion over whether the government offered Smith transactional immunity. (Smith Ex. 13.)

25. On July 24, 2003, the indictment in this action was filed. In it Smith was charged with wire fraud in Counts VII, VIII, IX, X, XI, XII, and XIII, in violation of 18 U.S.C. §§ 1343 and 1346; and in Count XIV with conspiracy to commit wire fraud with the other three defendants, in violation of 18 U.S.C. § 371.

DISCUSSION

Smith argues that at the proffer meeting and interview in Denver on August 7, 2002, he and the government "arrived at a meeting of the minds that the government would not prosecute him in exchange for his cooperation." (Doc. 66 at 7.) To establish entitlement to relief from prosecution on this basis, a defendant must show that there was "a mutual manifestation of assent--either verbally or through conduct." United States v. Jimenez, 256 F.3d 330, 347 (5th Cir. 2001), cert. denied, 534 U.S. 1140 (2002). Such an agreement may be unwritten, based upon oral statements. United States v. Minn. Mining & Mfg. Co., 551 F.2d 1106, 1112 (8th Cir. 1977). It may also be implied from the circumstances. Hercules v. United States, 516 U.S. 417, 424 (1996).

As Smith argues, in determining whether the government agreed to extend transactional immunity if he cooperated, the court must

consider both the relevant subjective and objective factors. Jimenez, 256 F.3d at 347.

The government has moved for the court's reconsideration of the applicability of the parol evidence rule to the asserted promise of conditional transactional immunity claimed by defendant Smith. Specifically, the government argues that, once it is established that the proffer agreement was entered into on August 7, 2002, the alleged oral promise is clearly a contemporaneous statement which, under Eighth Circuit law, cannot modify the written agreement. (Doc. 133.)

Smith responds that the parol evidence rule has no application to this case, because the immunity agreement came after the August 6, 2002 letter on which the government hinges its parol evidence claim. (Doc. 138.) Under the relevant facts, the undersigned concludes that the parol evidence rule is inapplicable and will deny the government's motion to reconsider.

Defendant argues that the factual linchpins of the agreement are the written statements in the government's proffer letter recognizing defendant Smith's desire to cooperate in return for transactional immunity, an oral statement by AUSA Martin during the August 7 meeting that the government will give Smith the immunity sought, if he provides sufficient evidence "to prove a case," and the subsequent cooperation by Smith.

The record is clear that the government made the statements set forth in the August 6, 2002 proffer letter, and Mr. Smith provided many substantial statements to the interviewers on August 7, 2002. However, the dispositive factor is whether Mr. Martin, during the August 7 meeting, made the statement set out in footnote 3 above.

The undersigned determines as a matter of historical fact, contrary to the testimony of Peck (and his handwritten notes of the meeting, which the undersigned does not credit as accurate) and Smith, that Martin did not expressly promise transactional immunity to Smith if he provided statements sufficient to prove a case

against one or more other persons. There are several bases for this credibility determination.

First, the statements of Martin and Peck before and after Smith's August 7 proffer are consistent with the government not having limited its broad discretion to charge Mr. Smith or not as it deemed appropriate. Before the proffer meeting, no one made any offer of immunity, neither in the oral conversations of August 2, August 5, or August 6, nor in the proffer letter to Smith dated August 6, 2002.

Second, the August 6 proffer letter recognized that Smith hoped for transactional immunity but expressly stated that consideration of such, whether to grant it or not to grant it, would be made after he made a proffer of information.

Third, Peck's handwritten notes state that Martin made a promise of immunity, conditioned upon the information being able to "prove a case" *prior to* the time Smith made his proffer of information. The context of the pre-letter statements is inconsistent with a promise to bind the government to extend immunity upon any condition.

Fourth, knowing what Smith told the government on August 7, 2002, from that date to and including June 17, 2003, in the many oral conversations with, and in the letter of June 11, 2003, to the government, Peck never stated that the government was obligated by law to give transactional immunity to Smith. In fact, during the meeting of June 17, 2003, Shostak, Smith's counsel, stated that they were no longer pursuing transactional immunity. It was not until the oral, telephone conversation with Martin that Peck asserted expressly that the government was obligated to give Smith transactional immunity, because of a noted statement Martin made on August 7, almost a year earlier.

The undersigned concludes that the government did not expressly promise Smith that he would not be prosecuted as he is, because of his proffer to the government on August 7, 2002.

The fact that the government never promised transactional immunity to Smith also determines defendant's argument that he is

entitled to equitable relief. The essential elements of such relief are a promise of immunity by the government in exchange for a defendant's cooperation, the expected cooperation by the defendant, and the subsequent prosecution of the defendant. United States v. McHan, 101 F.3d 1027, 1034 (4th Cir. 1996), cert. denied, 520 U.S. 1281 (1997). Constitutional due process requires that the government's promise of immunity be enforced where the defendant complied with the promise by cooperating to his detriment. United States v. Fuzer, 18 F.3d 517, 521 (7th Cir. 1994); accord Reed v. United States, 106 F.3d 231, 235 (8th Cir. 1997). In this case, there was no such promise before the August 7, 2002 proffer.

Since there was no promise by the government not to prosecute Smith, he is not entitled to the dismissal of the indictment.

Smith further argues that, if the indictment is not dismissed, the court should suppress his proffer statements from government use. To the court's understanding, the proffer letter dated August 6, 2002, provided

> any statements made by Mr. Smith during the proffer will not be used directly against him at any trial, whether during the Government's case in chief, cross-examination, or rebuttal. This agreement applies only to direct use of Mr. Smith's statements. Leads developed as a result of the proffer could be used in any potential prosecution against Mr. Smith. Additionally, were Mr. Smith prosecuted and he testified at trial contradicting statements made during the proffer, the proffer statements could be used as prior inconsistent statements. If [he failed] to be completely truthful during the proffer, his statements could also be used against him.

See Finding 7, above. There being no promise not to prosecute Smith, the proffer letter affords him all the relief to which he is entitled.

For these reasons, Smith's motion to dismiss or to suppress should be denied.

B. Kalkwarf's motion to suppress

Kalkwarf has moved to suppress statements he made to FBI agents on August 15, 2002. (Doc. 70.) Hearings were held on October 3 and 10, 2003. From the evidence adduced at the hearings the following findings of fact and conclusions of law are made:

FACTS

1. On August 15, 2002, at 6:45 a.m. FBI Special Agents Marshall and Coates went to the Clayton, Missouri residence of Kent D. Kalkwarf to interview him. The early hour was selected for two reasons: to coordinate with related interviews by other agents in other parts of the country, and to ensure he was at home.

2. After alighting from their car, the agents, dressed in business suits, walked to the front door and knocked or rang the bell. Mrs. Kalkwarf answered and opened the door. The agents identified themselves and displayed their credentials. She was immediately concerned that someone had died or there was some other tragedy. Agent Coates assured her that no one had died and that their visit was not a life-or-death situation. Through the open door Coates saw Mr. Kalkwarf inside the house. The agent then told Mrs. Kalkwarf that they just needed to speak with Mr. Kalkwarf about his employment at Charter [Communications].

3. Mr. Kalkwarf then came to the front door. Coates repeated to both of them that they were there about his Charter employment; the agent did not tell Mr. Kalkwarf that he was the target of the investigation. At that time either Agent Coates asked if the agents could enter or Mr. Kalkwarf spontaneously motioned both agents inside his residence. In either event, they entered with his consent.

4. Once inside the residence, Agent Coates asked if there was any place the agents could speak with Mr. Kalkwarf privately about Charter. He motioned for them to enter his study. They remained in the study for 3 or 4 minutes while he spoke with his wife outside the study. The agents could not see or hear them.

Mr. Kalkwarf then entered the study and sat down; the agents also sat down.

5. Next, Coates told Mr. Kalkwarf that they were there because of allegations that he and his employer made misstatements on certain documents. Mr. Kalkwarf asked whether he was going to need an attorney. Agent Coates replied, “That is your decision. We need a moment of your time to get a statement from you.” Thereafter, the agents asked questions which he answered. When Agent Coates began challenging some of Mr. Kalkwarf's statements, Mr. Kalkwarf said, “Maybe I should talk with an attorney.” Coates responded, “Don’t say anything. Just listen to what we have to say.” Coates then read to Mr. Kalkwarf part of an email message in an effort to get him to make further statements, which Mr. Kalkwarf did.[18] The agents did not make any contemporaneous written notes during the interview.

6. The interview ended when Mrs. Kalkwarf came to the study area after having dressed for work. She had not been present during the agents’ interview. When she came to the foyer area, Mr. Kalkwarf rose and joined her. Then the agents stood and left the study. The interview thus ended, with Agent Coates telling Mr. Kalkwarf that he should hire an attorney that would represent his best interests, because others would be doing so. The agents then left the Kalkwarf residence at 7:15 a.m.

7. At no time during the interview did the agents display any weapon. Neither agent escorted Mrs. Kalkwarf in the residence and they did not conduct any search of the residence or of the Kalkwarfs. Neither Mr. nor Mrs. Kalkwarf was restrained in any way or prevented from moving inside their home. The agents left without arresting Mr. Kalkwarf.

[18]At the hearing, Agent Coates testified that it is possible that Mr. Kalkwarf asked to see the email and that the agent refused.

8. Later on August 15, Inspector Boland served subpoenas upon Charter at its business offices. During that activity Mr. Kalkwarf made statements to Boland there.

DISCUSSION

In support of his motion to suppress, defendant Kalkwarf argues that the agents subjected him to custodial interrogation without advising him of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). (Doc. 70.) The government responds that the motion should be denied because Kalkwarf was not in custody when he made the statements. (Doc. 74.)

The government has the burden of establishing the admissibility of a defendant's statements by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 489 (1972); Colorado v. Connelly, 479 U.S. 157, 169-170 (1986). In the appropriate case, this burden includes showing that the statements, when it was required, were preceded by warnings defined by Miranda, and that the statements were voluntarily made. See United States v. LeBrun, 2004 WL 768860, at **4-5 (8th Cir. Apr. 9, 2004) (en banc).

There is no dispute in this case that Kalkwarf's statements on August 15 were made in response to the questioning of Agents Marshall and Coates and that they did not advise him of his Miranda rights. The resulting issue is whether the interview occurred under conditions constitutionally considered custodial for Miranda purposes. "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" LeBrun, at *3 (quoting Oregon v. Mathiason, 429 U.S. 495 (1977)).

i. Whether the interview was custodial

In LeBrun, the Eighth Circuit expressed relevant, controlling principles for determining whether statements were custodial.

> The ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest. Two discrete

> inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Thus, the critical inquiry is not whether the interview took place in a coercive or police dominated environment, but rather whether the defendant's freedom to depart was restricted in any way. In answering this question, we look to the totality of the circumstances while keeping in mind that the determination is based on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.

LeBrun, at *4 (internal quotations and citations omitted). The court then "discount[ed]" factors that were not relevant to the custody issue. Among them was whether the interview was conducted with coercive aspects, except where coercive aspects of the interrogation would cause a reasonable person to believe he was restricted in the freedom to depart. Id. at *5.[19]

In LeBrun, the defendant was convicted of strangling a superior Navy officer to death while on board ship. Investigators interviewed LeBrun four times during the fall of 1999 and did not interview him again until September 2000 when he became their lead suspect. On September 21, 2000, a federal agent and a Missouri Highway Patrolman arrived unexpectedly at LeBrun's place of business and asked to interview him at the Patrol office. They did not immediately tell him the subject of the interview. He agreed to go with them, because he believed they were interested in possible criminal activity of his employer. LeBrun rode in the front seat of an unmarked patrol car. He was not handcuffed or otherwise restrained and the door was unlocked. Id. at *1.

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[19]"[Oregon v. Mathiason, 429 U.S. 492 (1977)] and [California v. Beheler, 463 U.S. 1121 (1983)] teach us that some degree of coercion is part and parcel of the interrogation process and that the coercive aspects of a police interview are largely irrelevant to the custody determination except where a reasonable person would perceive the coercion as restricting his or her freedom to depart." LeBrun, at *5.

After they arrived, but before they entered the patrol building, the agent told LeBrun that he was not under arrest, that he could terminate the interview and leave at any time, and that he would be subject to video and audio taping throughout the building. They then entered the building and LeBrun was taken to a windowless interview room. The officers had earlier prepared psychological factors for the interview. They placed enlarged photographs of LeBrun's life in the room and had determined not to give LeBrun his Miranda warnings.[20] They also told him then that he was the prime suspect in the victim's death, that they had substantial evidence against him, and that a protracted trial in a distant district would hurt him financially and ruin his reputation. At no time during the interview did they shout at or use physical force against him. After 33 minutes of questioning he confessed. Id.

The officers had previously secured the presence of the victim's sister and a person who acted as the victim's brother. After LeBrun confessed, the agents asked whether he wanted to apologize to the sister. LeBrun said he did and, when they came into the room, he stated to them that he was responsible for the death and apologized. When the interview ended, LeBrun consented to a search of his home, he called his spouse, the agents drove him to his home and searched it, and they left him there without arresting him. Id. at 2. Following a hearing, the district court concluded that the interrogation had been custodial and that his confession had been coerced. A panel of the Court of Appeals affirmed. United States v. LeBrun, 306 F.3d 545, 557 (8th Cir. 2002). En banc the court reversed the district court.

The court reasoned that the coercive effects of the officers' actions and psychological ploys were irrelevant to whether a reasonable person in the defendant's circumstances would perceive that he was unable to leave or terminate the interrogation. He was never physically restrained. He was told he could leave at any

[20]The record was clear that LeBrun knew what his Miranda rights were. He also knew he was free to leave at any time.

time. He was not held incommunicado; he retained and used his cell phone. At the end of the interview he was not arrested but driven home. 2004 WL 768860, at *5. Further, LeBrun was educated, sophisticated, had not been placed under arrest during the earlier interviews, and had no reason to disbelieve the statement that he could leave at any time. Id. at 7.

The relevant facts of Kalkwarf's interview on August 15, 2002, lead to the conclusion that his was not a custodial interrogation. The interview occurred at his home. The agents entered his home with his consent. Kalkwarf directed them to his study where they could speak with him. Although the agents did not tell Kalkwarf that he could leave or terminate the interview at any time, he initially spent several minutes outside the study, away from them, speaking with his wife, and then joined them in the study. Thirty minutes later, after the agents' and Kalkwarf's statements to each other, the interview ended when Mrs. Kalkwarf came to the door of the study and Mr. Kalkwarf spoke with her in the foyer. At no time did the agents display any weapon, they did not search the residence or the Kalkwarfs, they did not physically restrain either of them in any way, and they left without arresting Kalkwarf.

During the interview, the agents told Kalkwarf that they were there because of allegations that he and Charter made misstatements on certain documents. When Kalkwarf asked whether he needed a lawyer, Agent Coates responded that was Kalkwarf's decision and that the agents needed a moment of his time to get a statement from him. They then engaged in questions and answers. Nothing so far in the manner the interview was conducted would have indicted to Kalkwarf that he was not able to have the agents leave his home, just as he had allowed them to enter and led them to the study.

When Agent Coates challenged Kalkwarf's statements, Kalkwarf again brought up the question of his getting an attorney ("Maybe I should talk with an attorney"), the agent in effect told him to be quiet and just listen; when Coates finished reading the email document to Kalkwarf, the interview continued and Kalkwarf made further statements. Nothing in this exchange adversely affected

Kalkwarf's physical ability to leave the interview, had he chosen to do so.

For these reasons, the undersigned concludes that the interview was not custodial and that the agents had not been required to advise Kalkwarf of his Miranda rights before interviewing him.

ii. Whether Kalkwarf's statements were voluntary

> A statement is involuntary when it was extracted by threats, violence, or express or implied promises sufficient to overbear the defendant's will and critically impair his capacity for self-determination. Whether a confession is involuntary is judged by the totality of the circumstances. The court must look at the conduct of the officers and the characteristics of the accused.

LeBrun, at *8 (internal quotations and citations omitted).

The factors the Eighth Circuit looked to in LeBrun lead to the conclusion that Kalkwarf's statements were voluntary. In LeBrun the interview lasted only 33 minutes, id. at *1; in the case at bar approximately 30 minutes. As in LeBrun, there was no evidence that the agents shouted at their subject, displayed any weapon, or physically threatened him.

The agents did exert psychological pressure to get Kalkwarf to make statements. Before Kalkwarf made his statements, he was told the agents were there because of allegations that he and his employer made misstatements on documents. His statements about legal counsel were rather swept aside by the agents. And he was told just to listen to the reading of the email document after which he made more statements. Such acts by the agents did not deprive Kalkwarf of his innate ability not to continue making statements. See id. at *8; United States v. Astello, 241 F.3d 965, 967 (8th Cir.), cert. denied, 533 U.S. 962 (2001). Consequently, the undersigned concludes that his statements were voluntary.

As set forth above, during the interview, Kalkwarf twice brought up whether he should seek legal counsel. And at the end of

the interview Agent Coates suggested he should do so. The issue indicated is whether the agents violated Kalkwarf's rights after he made the references to legal counsel by continuing to interview him. Such would be the case if the interview was custodial and Kalkwarf's statements were sufficient to constitute an invocation of his right to counsel. When a defendant invokes his right to counsel during custodial interrogation, the interrogation must cease and cannot again begin without the presence of counsel, unless the defendant initiates further communication, exchanges, or conversations with the police, even if the subsequent interrogation is about a different investigation. Arizona v. Roberson, 486 U.S. 675, 682-83 (1988) (rule of Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) applied in these circumstances).

In Kalkwarf's case, his interview by the agents was not custodial. Even if it had been custodial, to trigger a requirement that the agents stop the interview, "the suspect must unambiguously request counsel." Davis v. United States, 512 U.S. 452, 459 (1994). Such statements as "Maybe I should talk to a lawyer," id. at 455, "Do you think I need an attorney here?", Mueller v. Angelone, 181 F.3d 557, 573-74 (4th Cir.), cert. denied, 527 U.S. 1065 (1999), and "Could I call my lawyer?", Dormire v. Wilkinson, 249 F.3d 801, 805 (8th Cir.), cert. denied, 534 U.S. 962 (2001), are equivocal and not clear invocations of the right to counsel and are legally insufficient to trigger a requirement that the agents stop the questioning.

Kalkwarf's statements, asking the agents whether he needed an attorney and "Maybe I should talk with an attorney" are at best equivocal and are not clear statements by him that he then desired to consult with counsel.

Finally, nothing about the circumstances of Kalkwarf's statements when Inspector Boland served the subpoenas was shown to have deprived Kalkwarf of any constitutional right.

For these reasons, the motion of defendant Kalkwarf to suppress his statements should be denied.

ORDERS AND RECOMMENDATIONS

For the reasons set forth above,

IT IS HEREBY ORDERED that the motion of the government for production of witness's statement (Doc. 91) is sustained.

IT IS FURTHER ORDERED that the motion of the government for a pretrial determination of the admissibility of evidence (Doc. 28) is denied as moot.

IT IS FURTHER ORDERED that the motion of the government to reconsider the court's ruling on the parol evidence rule (Doc. 133) is denied.

IT IS FURTHER ORDERED that the motion of defendant James H. Smith, III, for in camera review of a Memorandum of Interview (Doc. 68) is sustained.

IT IS FURTHER ORDERED that the motion of defendants David G. Barford and Kent D. Kalkwarf for a pretrial scheduling conference (Doc. 147) is deferred to the district judge.

IT IS FURTHER ORDERED that the motion of defendants Barford and Kalkwarf to compel (Doc. 109) is denied, with the exceptions (a) that the government shall forthwith submit to the undersigned for in camera review the financial portfolios of potential government witnesses, together with the anonymous complaint received from the purported Charter employee, and (b) that the government disclose, not later than ten (10) days before trial, evidence that is favorable to the defense.

IT IS FURTHER ORDERED that the motions of defendants Smith (Doc. 67) and Kalkwarf (Docs. 58, 108) for a bill of particulars are denied.

IT IS FURTHER ORDERED that the motion of defendant Smith to strike surplusage (Doc. 141) is denied.

IT IS FURTHER ORDERED that the motion of defendant Smith for separation of the trial of counts I through VI from the trial of counts VII through XIV, or in the alternative to sever his trial from the trial of defendants Barford and Kalkwarf (Doc. 69) is denied.

IT IS FURTHER ORDERED that the motion of defendant Barford to sever (Doc. 154) is denied.

IT IS FURTHER ORDERED that the motion of defendant Kalkwarf to sever his trial from that of defendant Smith (Doc. 149) is denied.

IT IS FURTHER ORDERED that the motion of defendant Kalkwarf for separation of the trial on Counts I through VI of the indictment from that of Counts VII through XIV on grounds of misjoinder (Doc. 150) is denied.

IT IS HEREBY RECOMMENDED that the motion of defendant Smith to dismiss the indictment or in the alternative to suppress statements made pursuant to immunity agreement (Doc. 66) be denied.

IT IS FURTHER RECOMMENDED that the motions of defendant Barford to dismiss the indictment (Docs. 85, 145) be denied.

IT IS FURTHER RECOMMENDED that the motion of defendant Kalkwarf to dismiss the indictment (Doc. 90) be denied.

IT IS FURTHER RECOMMENDED that the motion of defendant Kalkwarf to suppress statements (Doc. 70) be denied.

NOTICE

The parties are advised they have fourteen (14) days to file written objections to these Orders and Recommendations. The failure to file timely written objections will result in a waiver of the right to appeal issues of fact.

DAVID D. NOCE
UNITED STATES MAGISTRATE JUDGE

Signed this 23rd day of April, 2004.